

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1169

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

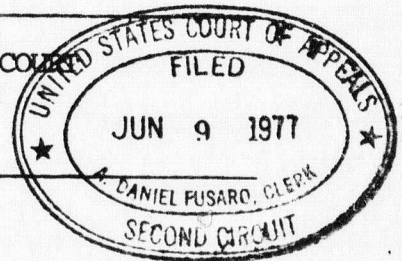
Appellee,

-against-

EUGENE WELCOME,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA

-against-

EUGENE WELCOME,

Appellant.

-----X

STATEMENT OF THE CASE

The appellant Eugene Welcome was charged in Count One of this five count indictment with conspiracy to commit a bank robbery in violation of Title 18, United States Code section 371; in Count Two with bank robbery by force in violation of 18 U.S.C. 2113(a) and 2; in Count Three with bank robbery in violation of 18 U.S.C. 2113 (d) and 2; and in Count Five with possession of a fire arm in violation of 18 U.S.C. 1202(a)(1) and (c)(3). Mr. Welcome was not charged in Count Four.

On the first day of trial the government moved to discuss Count One, which motion was granted. Also on the first day the Trial Court ordered a severance of Count Five on its own motion. This count was dismissed at the time of sentence upon motion by the government.

Upon a trial by jury, Mr. Welcome was convicted of counts two and three, the Honorable John R. Bartels presiding. On December 10, 1976 Mr. Welcome was sentenced to twenty years imprisonment on

each count, to run concurrently.

The government's proof at trial consisted primarily of the testimony of two people, Vanessa Hodges and DeWitt Owens, who said they took part in the bank robbery with Mr. Welcome.

Vanessa Hodges, a 22 year old young woman previously convicted of robbery (T:33), said that she first met Mr. Welcome in June, 1975 at his store at 388 Nostrand Avenue in Brooklyn (T:45)*. Mr. Welcome offered her a job working at his store making sandwiches. Ms. Hodges began working there part-time and soon thereafter began working regularly (T:48). Mr. Welcome himself worked long hours (T:172) at the store, a neighborhood grocery and sandwich store called 'Milkman's', and Ms. Hodges and Mr. Welcome developed a relationship like younger sister and older brother (T:48).

At the store Ms. Hodges met co-appellant Doris Miller, Willie Leach and Gloria Adams, all of whom also worked at the store.

Ms. Hodges said she knew Willy Leach was living with Mr. Welcome at 662 Park Avenue in Brooklyn, but that later Mr. Leach left Mr. Welcome's apartment and moved in with Ms. Miller at 346 Gates Avenue (T:169).

Ms. Hodges said that Willie Leach was killed in an unrelated bank robbery on December 30, 1975.

Mr. Welcome was against the use of drugs (T:174,562) and specifically didn't want Ms. Hodges to use drugs (T:186).

DeWitt Owens, a twenty-two year old young man who has been convicted of several robberies and eleven misdemeanors in state court (T:436-437), was released from jail on September 26, 1975 (T:442) and came to the Milkman's store to look for Vanessa Hodges, his common law wife since 1968 (T:428) whom he beat on many occasions

* "T" refers to transcript and page number.

and who has a scar from one of these beatings (T:193,533).

DeWitt Owens was introduced to Mr. Welcome by Ms. Hodges during early October 1975 (T:55) and according to Mr. Owens, he began working at Mr. Welcome's store.

Ms. Hodges testified that Mr. Welcome's business began getting bad in the fall of 1975 (T:49) and that beginning in October, 1975 Mr. Welcome began speaking to her about robbing a bank (T:56). Ms. Hodges further states that later in October, 1975 Mr. Welcome had a further conversation with her and Willy Leach about robbing a bank (T:59). Similarly Mr. Owens testified that Mr. Welcome had a talk with him in the back of the store about robbing a bank (T: 447,449).

In early November, 1975 all of the people from the store went to a party at a nightclub called the Cove at which time Mr. Welcome gave Mr. Owens a suit to wear (T:60, 453). Shortly after that Mr. Welcome had another talk in the back of the store with De Witt Owens, Ms. Hodges, and Willie Leach about robbing a bank, according to Ms. Hodges and Mr. Owens (T: 61, 455).

Again according to Ms. Hodges and Mr. Owens, another meeting was held in back of the store on November 8, 1975 with Mr. Welcome, Willy Leach and themselves at which time Ms. Hodges was assigned the role of looking into the bank to 'pinpoint' the guard (T:459) and the use of of ski masks and gloves was discussed (T: 64, 466). Mr. Welcome spoke of getting a bag from Gloria Adam's daughter Cynthia (T:63).

Both Ms. Hodges and Mr. Owens further testified that on Sunday November 9, 1975 another meeting was held to the same effect, at which time Mr. Welcome said they all must be 'professionals' and

'discipline themselves' (T:66,461) and that the money would be held in a kitty system to pay the store bills and expenses (T:66).

That night, Mr. Welcome and Gloria Adams, his common-law wife returned to their house at 662 Park Avenue, Brooklyn, and Ms. Hodges, Mr. Owens, Willie Leach and Doris Miller returned to Doris Miller's and Willy Leach's apartment and smoked marijuana (T:67). Willy Leach showed Ms. Hodges and Mr. Owens guns in Ms. Miller's chest, those being two .38 calibre pistols and a shotgun, all to be used in the bank robbery (T:69).

Early the next morning, the bank robbers found they had no masks so, according to Ms. Hodges and Mr. Owens, they were sent out by Mr. Welcome with a few dollars to buy masks. It being early and no stores being opened, they used the money to buy heroin and shoot up (T:74-76,472,476). The bank robbers decided to use panty hose of Ms. Miller and Ms. Hodges (T:87,476) and the three men taking the guns, Mr. Welcome and Willy Leach each with a .38 and Mr. Owens with a shot gun (T:90,477), drove off at 8:30A.M. to commit the bank robbery.

Upon arriving at the bank, located at Church and Flatbush Avenues, Ms. Hodges, as planned, went in, noted the position of the guard and came out and told the three men, who then went into the bank while Ms. Hodges waited in the car (T:92,478).

According to DeWitt Owens, the three men went into the bank, announced 'this is a stick-up', Mr. Welcome leaped over the counter and scooped up money into garbage bags while Willy Leach and DeWitt Owens kept guard, and then the three left and went into the car with Mr. Welcome driving away (T:479-480).

During the drive Mr. Welcome said 'shit, we left the bag' (T:93), referring to the bag of Cynthia Adams, according to Ms. Hodges.

The parties returned to Doris Miller's house where the money was counted and every one given \$1,000 (T:98-100) according to Ms. Hodges, who further said she and Mr. Owens ultimately got \$3,000 of the proceeds of that bank robbery (T:103).

Ms. Hodges further testified that during the end of February, 1976 she was called into the back of the store by Mr. Welcome who said he needed more money and spoke to her of robbing another bank (T:159). She said that in fact she and Mr. Welcome did rob the bank at Fulton Street and Flatbush Avenue in Brooklyn on March 1, 1976 by arriving at the bank, Mr. Welcome armed, going into the bank with the bank person who opened the bank at 8 A.M., waiting in the bank with masks on until 8:30 A.M. when the vault opened, taking the money and leaving by cab (T:158-161). Further Ms. Hodges says that the money was counted at Doris Miller's apartment, Ms. Hodges getting \$17,000 and Ms. Miller \$1,000 from this bank robbery (T:162).

Ms. Hodges also said that she was involved in attempted bank robbery during June 14-18, 1976 (T:191), which she planned on her own (T:193) and that Eugene Welcome had nothing to do with this bank robbery (T:191-192).

Ms. Hodges testified that she was arrested for bank robbery on June 18, 1976 (T:28); agreed to cooperate with the government immediately (T:29) and has pleaded guilty to conspiracy to commit the March 1, 1976 bank robbery (T:30).

DeWitt Owens testified that he was arrested July 8, 1976,

is now in jail, made an agreement with the government and has pleaded guilty to bank robbery. (T:430-431).

It was stipulated that the money missing from the bank on November 10, 1975 was \$36,897 (T:671).

FBI agent Jerry Loar testified that he arrived at the bank robbed on November 10, 1975 about one-half hour after the robbery and found a satchel (which Vanessa Hodges later identified as that of Cynthia Adam's) and a house key (T:674-675).

Agent Samuel Wicher stated that he searched Doris Miller's apartment at 346 Gates Avenue on June 18, 1976 and found a revolver and shot-gun, (T:685-687) which were later identified by Vanessa Hodges and DeWitt Owens.

Agent Don Weber testified that he took the key found by agent Loar at the scene of the crime to Mr. Welcome's apartment building, 662 Park Avenue, an eight-family apartment building, on October 1, 1976 and found that the key worked for the outer lobby door (T:717-719).

At this point the government rested and the appellant made a Rule 29 motion which was denied (T:756).

Mr. Welcome testified on his own behalf, stating that he was 38 years old, had been convicted of robbery in 1966 (T:768), opened the grocery store on Nostrand Avenue in February 1975 (T:770), hired Vanessa Hodges to work in his store, denied taking part in either the November 10, 1975 or the March 1, 1976 bank robbery, and admitted to possessing one of the guns in evidence for 'protection' against robberies from his store (T:816).

Doris Miller testified.

After an identification hearing, the government presented on rebuttal Robert Gilbert, who testified that he worked at the bank robbed on March 1, 1976, that he arrived at 8 A.M., Eugene Welcome armed with a weapon and a woman who waited in the bank until 8:30 A.M. when the vault opened, took some \$115,000 and left.

After summations and charge, the jury convicted Mr. Welcome of both counts submitted to them.

POINT I

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE HIGHLY PREJUDICIAL AND NON-PROBATIVE PROOF OF ANOTHER CRIME; THE APPELLANT WAS THEREBY DENIED THE RIGHT TO HAVE THE JURY DECIDE HIS GUILT OR INNOCENCE OF THE SPECIFIC CRIMES CHARGED UNENCUMBERED BY SUCH UNFAIR PREJUDICE.

Rule 404(b) of the Federal Rules of Evidence states that evidence of other crimes, wrongs or acts 'may' be admissible for some purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 of the same rules states as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."

In practical effect this means that the court must conduct a balancing test to weigh the probative value of the evidence offered as opposed to possible undue prejudice to the accused. In UNITED STATES V. DEATON, 381 F. 2d 114 (2d Cir. 1967), the court stated at 117: 'the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character.'

The fact that such a determination must be made on a case-by-case basis depending upon the particular factual setting has been noted by both courts and commentators.*

*See generally UNITED STATES V. BYRD, 352 F.2d 570 (2d Cir.1965); UNITED STATES V. JOHNSON, 382 F.2d 280 (2d Cir. 1967); Payne, Jr., "The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases," 3 U.Rich.L.Rev.62, 1968; Comment "Other Crimes Evidence At Trial: of Balancing and Other Matters," 70 Yale L.J.763(1961)

In speaking of the test of balancing probative value against possible prejudice, Judge Weinstein has written that it is virtually impossible to draw precise guidelines concerning the admissibility of evidence of other crimes. Generalizations have an initial appearance of solidarity but crumble on close analysis.* He states further that "the result in each case is...dependent on the particular facts the court is assessing."**

It is respectfully submitted that in the particular factual setting of this case, this appellant was unduly prejudiced by the Trial Court's ruling which allowed into evidence during the prosecution's case in chief testimony by Vanessa Hodges that the appellant Eugene Welcome committed a bank robbery on March 1, 1976. ***

It is noted that the bank robbery which was the subject of this trial took place on November 10, 1975.

The state of the record, taken in a light most favorable to the government, at the time the Trial Court made its ruling allowing in Vanessa Hodges' testimony that the appellant committed a subsequent bank robbery was as follows: Vanessa Hodges admitted to herself committing two bank robberies, one on November 10, 1975 and one on March 1, 1976 and one attempted bank robbery, on June 14-18, 1976. She was arrested on June 18, 1976 and immediately began cooperating with the government.

*Weinstein and Berger, Weinstein's Evidence, Section 404(10), p404-73.

**Weinstein, supra, pp.404-70,71

***This March 1, 1976 bank robbery was the subject of a separate then pending indictment against the appellant Eugene Welcome.

She had pleaded guilty to a conspiracy charge regarding the March 1, 1976 bank robbery. Vanessa Hodges had further testified that she worked at Mr. Welcome's store for several months beginning in June, 1975. Beginning in October 1975 and through early November 1975, Mr. Welcome began speaking about committing a bank robbery with, among others, Ms. Hodges. These conversations resulted in the November 10, 1975 bank robbery in which she participated, led by Mr. Welcome.

In brief, the above was the state of the record when the prosecutor made its offer of proof of the March 1, 1976 bank robbery testimony (T:104) and after legal argument, the Trial Court ruled the evidence admissable (T:120).

It is respectfully submitted that the Trial Court's ruling was in error in that there was no logical basis under Rule 404(b) to admit this evidence while it is manifest that the evidence was highly prejudicial; briefly put, the Trial Court erred in determining the balancing test of probative value versus prejudicial effect on this issue.*

Rule 404(b) mentions certain purposes for which evidence of other crimes may be admissable. Since the "other crime" in this situation took place almost four months after the crime on trial, evidence of that other crime could have no bearing on the motive, opportunity, intent or preparation leading up to the earlier crime. Rule 404(b) also speaks of the purposes of knowledge or absence of mistake or accident. These purposes are not relevant in this factual

*This evidence was objected to on a timely basis (T:106-120) and a motion for a mistrial on this issue was made and denied (T:157-158).

setting and therefore cannot justify the admission of this evidence.

Rule 404(b) also speaks of proof of plan as another purpose whereby evidence of another crime may be admitted. It is submitted the evidence in the trial below showed through the testimony of Vanessa Hodges that the March 1, 1976 bank robbery plan arose independently and separately from the bank robbery which was the subject of this trial. Indeed the record is barren of any testimony that in the discussions prior to the November 10, 1975 bank robbery there was any idea or plan for any subsequent bank robbery. As Vanessa Hodges' testimony about the March 1, 1976 robbery shows (T:158-162), it was apparently an unrelated independent plan that arose in February, 1976 (T:159). It is noted that there was a different modus operandi to the subsequent bank robbery and different personnel (that is, two of the four participants of the earlier bank robbery, Willie Ceach and DeWitt Owens) were neither consulted nor included.

The only other purpose mentioned in Rule 404(b) which could justify the admission of the proof of another crime is proof regarding identity. This was the basis that the prosecutor advanced below and that the Trial Court stated was its reason for admitting the evidence (T:120 and 920-921).

This reasoning is unsound.

The proof below is clear that Vanessa Hodges knew Eugene Welcome from the fact that she testified that she first met Mr. Welcome in June 1975 at his Nostrand Avenue store (T:45), that she

soon thereafter began working for him and that they had a relationship like brother and sister (T:47-48). There was never any contention raised that Vanessa Hodges' ability to identify Eugene Welcome was in question. Indeed, even the Trial Court stated during legal discussion: "She (Vanessa Hodges) knows Welcome. No question about her identity of Welcome." (T:119)

It is respectfully submitted that since the prosecution's offer of this evidence of another crime arose during Vanessa Hodges' testimony and there was absolutely no issue of her ability to identify the appellant, the admission of the evidence cannot be justified on an identity basis as was done at trial, or on any other basis, as discussed above, mentioned in Rule 404(b).

On the other hand, the prejudicial effect of this evidence upon Eugene Welcome is clear, if not overwhelming.

"All evidence of other crimes is prejudicial." 2 Weinstein's Evidence 404-70. "While disagreement is rife as to the proper scope of an exclusionary rule, everyone agrees that evidence of other crimes is most convincing." 2 Weinstein's Evidence 404-41.

Although it is true that the Trial Court gave limiting instructions to the jury concerning this evidence, it is submitted that without a rational basis to admit the evidence of other crimes in the first place, the instructions do not cure the vice of undue prejudice to the accused.

Further it is submitted that in analyzing this issue, it cannot be considered that the defendant-appellant later chose to testify in his own defense, during which he denied participating in the March 1, 1976 bank robbery and after which the prosecution could then perhaps properly have presented this evidence as rebuttal (as it did with the witness Robert Gilbert). This would not be a proper analysis since the decision by a defendant on whether to testify or not is made in part on the actual state of the prosecution's direct case, whether correctly admitted into evidence or not. Had the evidence of another crime not been admitted then the strategic decision on whether to testify could have been resolved in favor of not testifying and relying instead upon the presumption of innocence, whereas with the "most convincing" proof of another crime before the jury as part of the prosecutor's case in chief, the strategic considerations lead to a decision that the defendant must testify.

In summary, it is respectfully submitted that in the particular factual setting here, the evidence of a later independent and unrelated bank robbery by the defendant should not, employing the balancing test, have been admitted because it "tends to confuse the issue of guilt or innocence of the specific offense charged and to weigh too heavily with the jury." UNITED STATES v. RING, 513F.2d 1001, at 1004 (6th Cir. 1975).

POINT II

THE TRIAL COURT COMMITTED REVERSABLE ERROR IN CURTAILING CROSS-EXAMINATION ON THE IDENTIFICATION HEARING AND DENYING THE REQUEST FOR A REASONABLE ALBEIT LENGTHY TIME FOR SUMMATION; FURTHER, THESE RULINGS WERE MADE NOT ON THE MERITS BUT INSTEAD ON THE TRIAL COURT'S CONCERN FOR ITS OWN PERSONAL SCHEDULE AND ON AN APPARENT ANIMUS TOWARD TRIAL COUNSEL.

It is respectfully submitted that the Trial Court committed two errors in that it (A) curtailed the identification hearing regarding the witness Robert Gilbert preventing an adequate exploration and judicial determination of the issues raised in that hearing and (B) denied appellant Welcome's counsel's request for a reasonable albeit lengthy time for summation.

It is further respectfully submitted that these rulings were made not on the merits but rather on a combination of the Trial Court's concern for (C) its own personal schedule and (D) an apparent animus toward appellant Welcome's trial counsel.

(A)

Robert Gilbert was not a witness to the bank robbery on trial. He was a bank employee and witness to the March 1, 1976 bank robbery and was allowed to testify as a rebuttal witness for the prosecution.

The government first made his existence and the substance of his testimony known on Friday October 1, 1976 (T:749), two work days before the trial commenced on October 5, 1976.

At the time the government first said at trial that it was seeking to introduce the testimony of Mr. Gilbert, counsel immediately moved for an identification hearing. The motion was timely, as the Trial Court found (T:747-749).

Mr. Gilbert was the last witness at the trial and the hearing was held just prior to his testimony.

At the hearing Mr. Gilbert testified on direct examination that on March 1, 1976, employed by Chemical Bank as an officer's assistant, he arrived at work at 8 A.M. to open the bank at which time he was met by two bank robbers, a man with a gun and a woman who went inside the bank with him (T:950). When he told the two robbers that the vault could not be opened until 8:30 A.M., the male robber searched Mr. Gilbert and then told him to proceed as normal (T:951). At 8:30 A.M. Mr. Gilbert opened the vault, the two robbers took money in bags (T:955) and were gone by 8:35 A.M. (T:967).

Mr. Gilbert further testified that the male robber had a stocking mask on for part of the time and that for ten minutes out of the total thirty-five minutes the robbers were not wearing the masks (T:952). He further testified that he was the victim of a robbery two years before and therefore looked carefully this time (T:956-957).

Mr. Gilbert further testified that on March 11, 1976 he was shown many bank surveillance (not of the March 1, 1976 bank robbery) photos and picked out one as not of the bank robber but of someone "similar" (T:958). Further he said that on June 18, 1976 he was

shown six mug shots and picked out one (a picture of the appellant) as being that of the bank robber.

At defense counsel's request, Mr. Gilbert was asked if he could see the man in the courtroom and then picked out the appellant (T:61), who was at that time one of two black men in the courtroom, the other being a marshal of lanky build (T:962) whereas Mr. Gilbert described the robber as a man of "heavy" build (T:954).

Mr. Gilbert then picked out the same mug shot from the six as he had done on June 18, 1976 and said that the agent had "never pointed to any particular one and asked whether that was the one" (T:965).

That was the state of the record after the government finished its questions on the hearing.

Upon cross-examination the defense asked for the pictures Mr. Gilbert was shown on March 11, 1976 from which he picked a man who was similar. That request was denied (T:966). Mr. Gilbert was allowed to testify on cross-examination that he had never seen the bank robber from the day of the robbery until that day in court (T:972), that the male bank robber had a hat on throughout (T:971), that when he went in the back of the bank he could not see the robber's face (T:968), that when he was in the front of the bank the robber was squatting down behind a counter and other questions designed to narrow down how much of the ten minutes the mask was off Mr. Gilbert actually saw the robber's face.

Questions on cross-examination* had not gotten to the areas of what the agents did or said during the two separate occasions of showing of the mug shots and the showing of the bank surveillance photos and whether there was any suggestability in either presentation when the Trial Court cut off all further questions and without hearing legal argument, denied the motion (T:980-982).

The purpose of the hearing was to insure against any taint or suggestion in the identification process resulting in a misidentification which would then carry over into the trial. This danger in identification testimony, resulting from prior photographic identification particularly, has been noted by the Supreme Court in *SIMMONS v. UNITED STATES*, 390 U.S. 377, 88 S.Ct. 1967, 19 L.Ed.2d 1247 (1968) where it stated:

"Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification."

The later case of *UNITED STATES v. ASH*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed. 2d 619 (1973), while holding that counsel was not required at photographic identifications, laid great stress, particularly in Mr. Justice Stewart's concurring opinion, that "any unfairness that does occur" can be flushed out by an accused's "right meaningfully to cross-examine" such witnesses.

It is respectfully submitted that in the case at bar, involving a witness who saw the bank robber for a small period of time

*The cross-examination of Mr. Gilbert on the hearing covers pages 966-972, 974-975, and 979, at which point the Trial Court denied any further questions.

on the scene and at no time thereafter until asked to make an identification in a courtroom where the accused was sitting at the defense table, the only black male, six months later and where there were two intervening showings of photographic arrays, this is a case where "meaningful" cross-examination should be allowed to insure against the danger of misidentification.

Such was not the case in the hearing below.

Relevant points which counsel was simply not allowed to explore include (1) further refinement of exactly how much time the witness actually saw the bank robber's face, as opposed to how much time the robber had his mask off; (2) the notes, including a description of the bank robber, the witness made shortly after the robbery;* (3) a viewing of the photos of the first array shown Mr. Gilbert including the critical question of whether any of the bank surveillance photos from the November 10, 1975 bank robbery of the person whom the prosecution charged is Mr. Welcome were included among those shown to Mr. Gilbert; (4) the procedure, including instructions of the agents, at the first photo array shown to Mr. Gilbert; (5) further detail as to the procedure and what was said by the agents at the second photo array shown Mr. Gilbert; and (6) allowing Mr. Gilbert to answer candidly whether he felt his in court identification was based on seeing the picture rather than the incident itself.**

*Mr. Gilbert testified he did make notes, including a description of the bank robber (T:972 and 1002-1003). The witness was apparently not instructed to bring any notes or memoranda he made of his observations at the scene of the crime.

**This question was asked, however the Trial Court would not allow the answer (T:980-981)

It is submitted that all of the above matters are relevant to the issues of the identification and that this Court cannot resolve the issues since counsel was not allowed to cross-examine "meaningfully" or even at all on some areas so that no evidence on these points was heard.

It is respectfully submitted that this Court should remand the case for a full and adequate identification hearing as to the witness Robert Gilbert so that all relevant evidence be elicited, meaningful cross-examination be had and a proper judicial findings and determination be made.

(B)

Counsel for appellant Welcome requested two and one-half hour's time for summation (T:879). The Trial Court denied this request (T:879-880) and allowed one hour and fifteen minutes.

It is fully conceded at the outset that any trial judge in the administrative facet of his role has the right to set reasonable limits on matters that arise at trial, including summation. No part of this argument seeks to restrict that authority.

However it is submitted that such authority must be exercised with discretion and in the interests of justice, not because of the Trial Judge's personal scheduling convenience or because of animus for the attorney making a request.

The trial attorney for the appellant Welcome stated that he

requested two and one half hours for summation in order to make an adequate presentation for his client and that he did not believe that in condensing it to the time the Trial Judge allowed he could do justice to his client (T:879-880, see also 1277-1278). He stated repeatedly however that he would abide by the trial court's directions (T:879-880, 1010) and, in fact, did so.

It is respectfully submitted that in a trial involving five full days of testimony (October 5, 6, 7, 12, 13, 1976) where an accused is facing exposure of twenty-five years and likely, if convicted, to get near the maximum, as Welcome did, then a request for two and one half hours summation, although perhaps lengthy, is reasonable. Further it is respectfully submitted that in this particular situation the denial of such request, where the trial attorney states he cannot adequately present or condense his closing arguments, is reversible error.

(C)

As stated at the outset of this point, it is submitted that the trial minutes show that the rulings of the Trial Court detailed above which curtailed cross-examination during the identification hearing and denied trial counsel's request for two and one half hours summation time were made not on the merits but rather on a combination of the Trial Court's concern for its own personal schedule and an apparent animus toward appellant Welcome's trial counsel.

As to the scheduling matter, it is noted that this trial began on October 5, 1976 during which day the jury was selected and testimony begun. Further evidence was taken October 6 and October 7, 1976.

The trial was not held on Friday October 8, 1976 because, as the Trial Court explained to the jury, that was the court's motion day and "it would be almost impossible to continue the trial..." (T:375)

Monday October 11, 1976 was Columbus Day and although counsel for Mr. Welcome said he was ready to proceed with the trial on that holiday (T:382), the Trial Court told the jury the trial was recessed until Tuesday October 12, 1976 (T:571).

The trial did indeed resume on Tuesday October 12, 1976 and a full day of evidence heard.

The record shows that the Trial Court had a scheduling conflict however and for reasons of its own, felt it had to finish the case, including verdict, by the night of Thursday, October 14, 1976.

The Trial Court stated on October 13, 1976 that "we're short of time. We must proceed....I have to finish this case by Thursday evening." (T:862)

Whatever the reason for the Trial Court's scheduling concern, it was not to be available to try another case beginning on Friday October 15, 1976 as is indicated by the Trial Court's statement on Thursday October 14, 1976 after the verdict when it said, regarding

the next day: "I am going to be leaving around eleven o'clock."

(T:1298)

It is submitted that the real reason for the Trial Court's rulings curtailing cross-examination on the identification hearing and limiting the amount of time for summation had to do with the Trial Court's personal scheduling concerns and were not on the merits.

It is noted that the Trial Court's curtailment of cross-examination of Mr. Gilbert at the identification hearing took place during the afternoon of October 13, 1976, at which time the Trial Court was concerned that the evidence be completed by the end of the day and so that summations and charge could be given before lunch on Thursday October 14, 1976 and a verdict could be reached by Thursday evening, as the Trial Court stated.

Further it is noted that had the Trial Court granted the request of appellant Welcome's trial counsel for two and one half hours summation, this might have resulted in the jury not being charged until after lunch on Thursday October 14, 1976 (rather than before lunch as the Trial Court did charge them) which may in turn have resulted in deliberations lasting over until Friday October 15, 1976, thereby disrupting the Trial Court's schedule.

It is respectfully submitted that where an accused is facing twenty-five years in prison, the administration of his trial should not be affected by time factors such as those present in this case; further it is submitted that where any component of legal decisions

on issues such as identification or administrative decisions such as allotting reasonable time for summation is influenced by the Trial Court's personal scheduling concerns, rather than seeking justice in the case on trial, then such decisions are in error.

(D)

As to the apparent animus of the Trial Court toward appellant Welcome's trial counsel, it is respectfully submitted that this is revealed at several points, progressively growing in intensity, throughout the record.

After initial moments of apparent gratuitous sarcasm early in the trial (T:145 and 157), the Trial Court referred to an entirely legitimate area of cross-examination by appellant Welcome's trial counsel as raising a "red herring" (T:727). This comment by the trial judge was made in front of the jury.*

That the point** appellant Welcome's trial counsel was asking about was a question grounded in evidence already in the record

*The entire exchange takes place on pages 725 through 730 of the transcript.

**The point arose during FBI agent Donald Weber's testimony when he stated that he took a key found in a bag left at the bank on November 10, 1976 to Mr. Welcome's residence, 662 Park Avenue, in Brooklyn, and found that the key worked for the outside door (T:717). This was clearly damaging evidence to the appellant Welcome if left alone.

All parties had conceded that Willie Leach, by then deceased, had taken part in the November 10, 1976 bank robbery.

Since there had been prior testimony that for a period prior to the bank robbery Willie Leach lived at Mr. Welcome's apartment at 662 Park Avenue, appellant Welcome's trial counsel sought to hopefully bring out and emphasize this point through the witness on the stand, thereby dulling the impact of the testimony against Mr. Welcome and lending itself to a summation argument that the jury might reasonably infer that the key found at the scene of the crime belonged to Willie Leach, not Eugene Welcome.

It was this area of questioning that the Trial Court said was raising a "red herring."

was conceded by the prosecutor (T:729) as being based on the evidence. See page 169 of the transcript.

It is respectfully submitted that such a characterization by the Trial Judge was unjustified and arose from apparent animus toward counsel.

Later during the identification hearing the Trial Judge restricted cross-examination and ultimately terminated the hearing with a continuing flow of rulings based in part on personality observation. This exchange occurs from pages 972 through 982 of the trial record.

What the trial transcript does not reveal is that many of the Trial Court's statements to counsel were in the form of yelling and the negative effect this had on the atmosphere of what should be an impartial forum seeking to do justice.

Finally, the Trial Court indicated its animus by continued unnecessary interruptions of the summation on behalf of appellant Welcome.

All tolled, there were fourteen times when the Trial Court interjected unnecessarily during appellant Welcome's trial counsel's summation, which gave the summation at times, wore the air of a running dialogue between Judge and counsel rather than an address by counsel to the jury.

The fourteen interruptions by the Trial Judge were on the following pages of the transcript:

- 1) page 1138
- 2) page 1141
- 3) page 1142
- 4) page 1144
- 5) page 1148
- 6) a second time on page 1148
- 7) page 1151
- 8) page 1160
- 9) page 1165
- 10) page 1166
- 11) page 1170
- 12) page 1171
- 13) page 1173
- 14) page 1185

(E)

It is respectfully submitted that the appellant Eugene Welcome was denied a proper hearing on the identification issue as to the witness Robert Gilbert and was denied a fair trial in the particular circumstances of this case by the denial of the request for a reasonable albeit lengthy time for summation in that the determinations of these rulings were not made on the merits but were rather based on the Trial Court's concern for its own schedule and on an apparent animus reflected in the trial transcript that the Trial Court felt toward appellant's trial counsel.

In sum, the effect in these particular circumstances was to deny appellant a fair trial.

POINT III

THE ACTIONS AND WORDS OF THE TRIAL COURT WHICH DISPARAGED APPELLANT'S TRIAL COUNSEL AND QUESTIONED THE DEFENSE IN FRONT OF THE JURY WERE IMPROPER AND DENIED APPELLANT A FAIR TRIAL.

For the sake of brevity, appellant repeats contentions put forth in Point II(d) of this brief as part of this point.

What is a United States District Court Judge doing characterizing, in front of the jury, an area of cross-examination by counsel of the accused as raising a 'red herring'?

It would perhaps be appropriate for a Trial Judge to use such language at sidebar if counsel did indeed attempt to raise a false issue not grounded in the evidence. Even then it would be prejudicial to do so in front of the jury.

In this case, however, the questions put and inferences sought to be raised were based on evidence previously elicited at trial (T:169) and it is submitted that any jury, respectful of the nuances as well as the words of a Trial Judge, could not help but be negatively influenced by this Trial Judge's outright attack on a legitimate area of defense concern.

While it is true that the Trial Judge below later said in front of the jury, 'I withdraw that characterization. I withdraw it' (T:729), this lamely worded instruction cannot undo the vice of a Trial Judge descending from the role of impartial magistrate and becoming a partisan, casting aspersions on defense counsel and defense points and thereby improperly influencing the jury.

It is submitted that any jury would be negatively disposed toward arguments of counsel during summation when the Trial Judge himself has earlier openly questioned the integrity of counsel's arguments during cross-examination.

This is a burden no accused should have to bear.

It is submitted that this appearance of bias and less than full impartiality by the Trial Court was reinforced by the repeated interruptions of the appellant's trial counsel's summation, as detailed in Point II (d).

It is submitted that these frequent and unnecessary interruptions had the effect of badgering counsel in front of the jury and only served to reinforce the impression left on the jury by the Court's earlier characterization of a legitimate defense point as a 'red herring.'

The integrity of the jury system can only be preserved when the Judge strives to maintain the fact and the appearance of objectivity and impartiality. Once a judge indicates to the jury, whether openly or subtly, that it questions the soundness of arguments by either counsel, then the fairness and integrity of the jury system are undone.

It is respectfully submitted that the appellant Eugene Welcome was denied a fair trial.

POINT IV

THE APPELLANT WELCOME ADOPTS ALL ISSUES AND ARGUMENTS RAISED BY
CO-APPELLANT AS IF FULLY SET FORTH HEREIN.

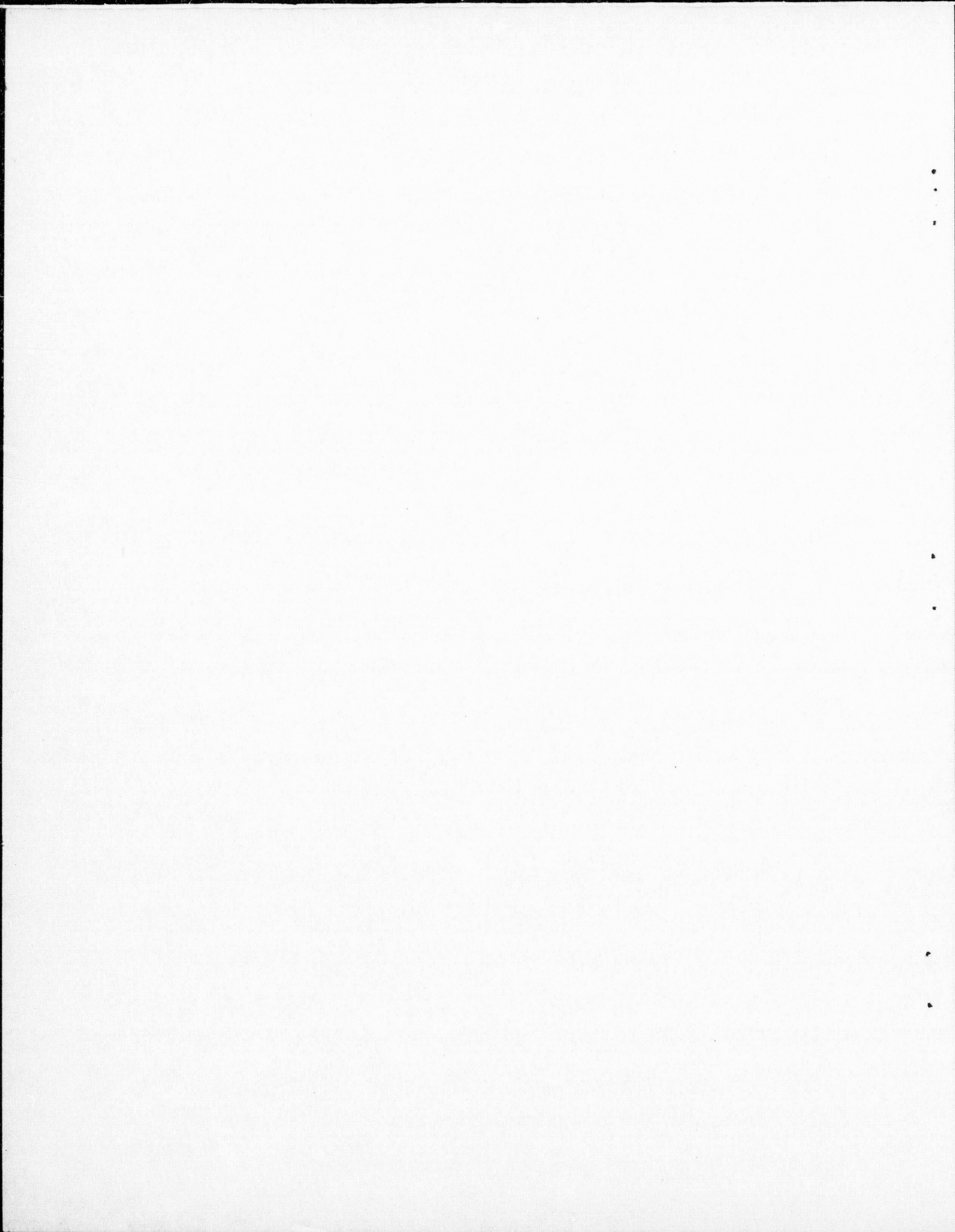
Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the appellant Eugene Welcome adopts all issues and arguments raised by co-appellant as if fully set forth herein.

CONCLUSION

For the above stated reasons, the judgment of conviction of the appellant Eugene Welcome should be reversed.

Respectfully submitted,

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